

3-24-2016

State v. Demint Appellant's Brief Dckt. 43367

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"State v. Demint Appellant's Brief Dckt. 43367" (2016). *Idaho Supreme Court Records & Briefs*. 6043.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6043

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43367
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2014-12188
v.)	
)	
WILLIAM SCOTT DEMINT,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2016 MAR 24 PM 3:31

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE STEVEN J HIPPLER
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

JENNY C. SWINFORD
Deputy State Appellate Public Defender
I.S.B. #9263
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

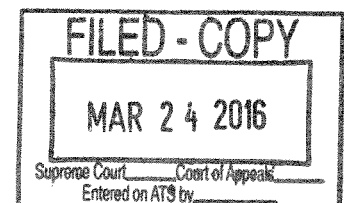


TABLE OF AUTHORITIES

Cases

<i>Alabama v. White</i> , 496 U.S. 325 (1990)	10
<i>Florida v. Jardines</i> , 133 S. Ct. 1409 (2013)	13
<i>Florida v. Royer</i> , 460 U.S. 491 (1983)	11
<i>Longshore v. State</i> , 924 A.2d 1129 (Md. 2007)	10
<i>State v. Anderson</i> , 154 Idaho 703 (2012)	6, 7, 9, 10
<i>State v. Danney</i> , 153 Idaho 405 (2012)	5, 6
<i>State v. Ellis</i> , 155 Idaho 584 (Ct. App. 2013)	6
<i>State v. Gibson</i> , 141 Idaho 277 (Ct. App. 2005)	10
<i>State v. Green</i> , 158 Idaho 884 (2015)	6
<i>State v. Hansen</i> , 138 Idaho 791 (2003)	6
<i>State v. Hunter</i> , 156 Idaho 568 (Ct. App. 2014)	6
<i>State v. Josephson</i> , 123 Idaho 790 (1993)	9
<i>State v. Munoz</i> , 149 Idaho 121 (2010)	6
<i>State v. Parkinson</i> , 135 Idaho 357 (Ct. App. 2000)	6
<i>State v. Reynolds</i> , 146 Idaho 466 (Ct. App. 2008)	11
<i>State v. Wulff</i> , 157 Idaho 416 (2014)	6
<i>Texas v. Brown</i> , 460 U.S. 730 (1983)	9
<i>United States v. Grubbs</i> , 547 U.S. 90 (2006)	9
<i>United States v. Ortiz–Hernandez</i> , 427 F.3d 567 (9th Cir. 2005)	9
<i>United States v. Pierce</i> , 622 F.3d 209 (10th Cir. 2010)	13
<i>United States v. Place</i> , 462 U.S. 696 (1983)	6

STATEMENT OF THE CASE

Nature of the Case

During a traffic stop, a police officer deployed a drug dog to sniff around William Scott Demint's truck. The dog initially alerted outside the driver's side door, but then the dog failed to alert inside the cab of the truck. Once the dog did not alert inside the cab, any probable cause to search dissipated. Yet the officer proceeded to search Mr. Demint's truck by opening camper shell and tailgate and directing the dog jump inside. The dog alerted, and the police searched Mr. Demint's truck. Mr. Demint moved to suppress the evidence obtained from the search. The district court denied his motion. Mr. Demint now appeals from the district court's judgment of conviction, contending the district court erred by denying his motion to suppress.

Statement of Facts and Course of Proceedings

On October 28, 2014, the State filed an Indictment charging Mr. Demint with trafficking in methamphetamine (400 grams or more), possession of drug paraphernalia with the intent to deliver, unlawful possession of a firearm, possession of a controlled substance, and two misdemeanors for possession of a controlled substance and paraphernalia. (R., pp.53–55.) The State also filed an Information Part II alleging a persistent violator sentencing enhancement under I.C. § 19-2514.¹ (R., pp.66–67.) These charges arose out of a traffic stop and subsequent search of Mr. Demint's truck on August 20, 2014. (Tr. Vol. I,² p.86, L.22–p.87, L.1, p.91, Ls.17–21, p.93, Ls.13–17,

¹ The State later filed an Amended Information Part II. (R., pp.126–28.)

² There are two transcripts in the record on appeal. The first, cited as Volume I, includes the hearings on Mr. Demint's motion to suppress, the entry of plea, and sentencing. The

Ls.12–15, p.190, Ls.8–13.) Mr. Demint reserved his right to appeal the district court's denial of his motion to suppress. (R., pp.156–57; Tr. Vol. I, p.175, Ls.17–21, p.176, Ls.7–10, p.183, Ls.3–15.) The district court accepted Mr. Demint's conditional guilty plea. (Tr. Vol. I, p.190, L.14–p.191, L.1.) Following a sentencing hearing on May 26, 2015, the district court sentenced Mr. Demint to twenty years, with ten years fixed, for trafficking in methamphetamine and five years, with two and one-half years fixed, for unlawful possession of a firearm, to be served consecutively. (Tr. Vol. I, p.240, Ls.10–23, p.241, Ls.5–11.) The district court entered a Judgment of Conviction and Commitment on May 28, 2015. (R., pp.166–69.) Mr. Demint filed a timely Notice of Appeal from the Judgment of Conviction on June 18, 2015. (R., pp.176–78.)

ARGUMENT

The District Court Erred By Denying Mr. Demint's Motion To Suppress

A. Introduction

A police officer stopped Mr. Demint's truck for two traffic infractions. The truck had an extended cab and its bed was covered with a plastic camper shell. During the stop, the officer ran his drug dog around the truck, starting at the driver's side. The dog alerted outside the driver's side door, but the dog failed to alert once directed inside the cab by the officer. The officer then searched the cab with the dog inside, and the dog still did not alert. Nor were any drugs found inside the cab. The officer continued to run the dog around the truck to the tailgate. The dog did not alert. The officer proceeded to open the bed's camper shell and tailgate and directed the dog jump inside. The dog alerted inside the enclosed bed.

Mr. Demint contends that the police officer's opening of his enclosed truck bed and directing of the dog's entry into the bed was an unlawful search in violation of the Fourth Amendment. Any probable cause to search had dissipated once the dog failed to alert inside the extended cab and around the truck and the police officer's search of the cab revealed no contraband. Due to the unlawful search, the district court erred by denying Mr. Demint's motion to suppress the evidence obtained from the search of his truck.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Danney*, 153 Idaho 405, 408 (2012); *see also State v.*

Anderson, 154 Idaho at 706. Combining these two principles, “[a] reliable drug dog’s alert on the exterior of a vehicle is sufficient, in and of itself, to establish probable cause for a warrantless search of the interior.” *Id.*

In this case, Deputy Kevin Lowry and Sergeant Matt Clifford of the Ada County Sheriff’s Office were working specialized criminal interdiction on Interstate 84 (“I-84”) on the day of the traffic stop, August 20, 2014. (Tr. Vol. I, p.86, L.22–p.87, L.17.) Deputy Lowry had a drug detection dog with him. (Tr. Vol. I, p.84, L.22–p.85, L.13, p.87, Ls.18–19.) Deputy Lowry was watching for Mr. Demint’s truck because Deputy Lowry received information from narcotics police officers that a maroon F-150 truck with a certain license plate would be driving from Salt Lake City, Utah, possibly with methamphetamine. (Tr. Vol. I, p.87, L.20–p.88, L.1, p.112, Ls.7–24, p.122, L.17–p.124, L.18.) Deputy Lowry was also told by the narcotics officers Mr. Demint would be the driver of the truck and there would be a passenger. (Tr. Vol. I, p.124, Ls.7–16.)

At about 6:09 p.m., Deputy Lowry stopped Mr. Demint’s truck on westbound I-84 for two traffic infractions: speeding in a construction zone and failing to use a turn signal properly. (Tr. Vol. I, p.86, Ls.22–p.87, L.1, p.88, L.17–p.89, L.2.) The narcotics officers’ description of the vehicle matched Mr. Demint’s truck. (Tr. Vol. I, p.88, Ls.12–15, p.112, Ls.13–15.) Mr. Demint’s truck has an extended cab with four passenger seats and a plastic camper shell over the bed. (Tr. Vol. I, p.19, Ls.16–22; State’s Exs. A, B.) Deputy Lowry approached the truck and obtained some basic information, such as identification, from Mr. Demint and Mr. Thomas. (Tr. Vol. I, p.62, Ls.17–24, p.97, Ls.3–17; see also State’s Ex. D, 0:08–7:43.) Deputy Lowry did not smell any marijuana or see any drug paraphernalia in the truck. (Tr. Vol. I, p.111, L.18–p.112, L.3.) He observed

(Tr. Vol. I, p.100, Ls.1–3, 19–23.) The dog alerted inside the bed of the truck. (Tr. Vol. I, p.101, Ls.2–4.) Deputy Lowry searched a container inside the truck and found no drugs. (Tr. Vol. I, p.101, Ls.13–17.) He put the dog back in his car and returned to the bed of the truck. (Tr. Vol. I, p.101, Ls.16–21.) He searched another container in the bed and found contraband. (Tr. Vol. I, p.96, Ls.9–14, p.101, Ls.21–22.)

Based on these facts, any probable cause to search the enclosed bed of Mr. Demint's truck dissipated by the time Deputy Lowry opened the enclosed bed. "Probable cause is established when the totality of the circumstances known to the officer at the time of the search would give rise—in the mind of a reasonable person—to a fair probability that contraband or evidence of a crime will be found in a particular place." *Anderson*, 154 Idaho at 706 (citing *State v. Josephson*, 123 Idaho 790, 792–93 (1993)). "Probable cause is a flexible, common-sense standard, and a practical, nontechnical probability that incriminating evidence is present is all that is required." *Id.* (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983)). Probable cause can dissipate, however. "[I]f probable cause is established at any early stage of the investigation, it may be dissipated if the investigating officer later learns additional information that decreases the likelihood that the defendant has engaged, or is engaging, in criminal activity." *Id.* at 706–07 (quoting *United States v. Ortiz–Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005)). "[P]robable cause may cease to exist' when police 'learn, for instance, that contraband is no longer located at the place to be searched.'" *Id.* at 706 (quoting *United States v. Grubbs*, 547 U.S. 90, 96 n.2 (2006)). The investigative stop must end once probable cause dissipates. *United States v. Watts*, 7 F.3d 122, 126 (8th Cir. 1993). Here, the dog searched the entire extended cab area, including the window to the bed,

Moreover, nervous behavior, even considered together with other factors that could be indicative of criminal activity, may not be sufficient to establish probable cause. See *Florida v. Royer*, 460 U.S. 491, 507 (1983). Turning to the narcotics tip, the State conceded at the suppression hearing that it was “not arguing” Officer Lowry had probable cause to stop Mr. Demint’s truck “based solely on the narcotics tip.”⁴ (Tr. Vol. I, p.157, Ls.3–9.) See *State v. Reynolds*, 146 Idaho 466, 470 (Ct. App. 2008) (the burden is on the State to show the warrantless search falls within an exception to the warrant requirement). If the narcotics tip does not provide probable cause for the stop, it follows that the narcotics tip does not provide probable cause for the search. In addition, Deputy Lowry’s testimony at the suppression hearing provides no information on his knowledge of the credibility or reliability of the source of the tip received by the narcotics officers. (See Tr. Vol. I, p.87, L.20–p.88, L.1, p.112, L.4–p.113, L.1, p.122, L.9–p.126, L.6.) Therefore, Mr. Demint’s nervousness and the narcotics tip—coupled with the dog’s failure to alert and Deputy Lowry’s fruitless search in the cab—are insufficient to maintain probable cause for the search of the enclosed bed of Mr. Demint’s truck.

The facts in this case are in stark contrast to the facts in *Anderson*, where the Court found that the officers maintained probable cause despite the dog’s failure to alert

⁴ Regarding the State’s concession, the district court stated:

If [the State] were trying to argue that [the narcotics tip] was part of their probable cause, then I could see well, maybe, yeah, you need to go look and see if that is something you can rely on for probable cause. But I understand them to be saying that’s not their basis for probable cause to stop the vehicle.

(Tr. Vol. I, p.157, Ls.13–18.) Ultimately, the district court based its determination of probable cause to search on the dog’s alert outside the driver’s side door. (See Tr. Vol. I, p.171, L.5–p.174, L.2.)

difficulty stopping Mr. Demint's vehicle. (Tr. Vol. I, p.91, Ls.17–21.) There is no indication in the record that Mr. Demint or Mr. Thomas failed to follow Deputy Lowry's instructions. (State's Ex. D, 0:08–7:43.) Mr. Demint and Mr. Thomas answered all of Deputy Lowry's questions and complied with all his requests. (State's Ex. D, 0:43–7:43.) Deputy Lowry did not see or smell any drugs or paraphernalia during his initial encounter with Mr. Demint and Mr. Thomas. (Tr. Vol. I, p.111, L.18–p.112, L.3.) These circumstances further diminish any probable cause to believe that contraband would be found in Mr. Demint's truck. Under the totality of the circumstances, any probable cause had dissipated once the dog failed to alert again inside the cab or around the truck and Deputy Lowry's own search revealed no contraband.

Due to the lack of probable cause, Deputy Lowry's search with the dog of the enclosed bed of Mr. Demint's truck violated the Fourth Amendment. A dog sniff inside a vehicle constitutes a search when the dog's entry inside the vehicle is facilitated by law enforcement. *United States v. Sharp*, 689 F.3d 616, 619 (7th Cir. 2012); *United States v. Pierce*, 622 F.3d 209, 214 (10th Cir. 2010); see also *Florida v. Jardines*, 133 S. Ct. 1409, 1416–18 (2013) (holding a dog sniff on the curtilage of home was a search using a property rights theory). For example, a search occurs when police officers open a vehicle's door and "desire to facilitate a dog sniff" of the vehicle's interior. *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998) (emphasis omitted). Here, Deputy Lowry opened the camper shell and tailgate of the bed and directed the dog to jump inside. (Tr., p.100, Ls.1–3, 19–23, p.145, Ls.15–16.) The jump was not instinctual. In fact, Deputy Lowry testified that he was using the dog as a "locating tool." (Tr. Vol. I, p.145, Ls.19–22, p.146, Ls.4–9.) Thus, a warrantless search occurred when Deputy

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of March, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WILLIAM SCOTT DEMINT
INMATE #85013
ISCC
PO BOX 70010
BOISE ID 83707

STEVEN J HIPPLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

JOSEPH C MILLER
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

JCS/eas